

³ The Board notes that, following the February 23, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 24, 2018 appellant, then a 34-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on September 12, 2018 she sustained an injury to her left shoulder when she was carrying packages upstairs and an entire step collapsed, causing her to fall to the left and hit her shoulder, while in the performance of duty. She did not stop work.

A September 12, 2018 urgent care report from Dr. Brian Hagler, a Board-certified family practitioner, related appellant's history of injury. Dr. Hagler's examination revealed pain with movement of the left shoulder and tenderness over the acromioclavicular (AC) joint. He reviewed x-ray scans of appellant's left shoulder taken on the same date, which revealed no acute abnormality, and diagnosed a left shoulder injury.

A medical report dated October 3, 2018 from Dr. Thomas E. Kingsley, Board-certified in family medicine and an occupational medicine specialist, related appellant's history of carrying packages up cement steps when a step gave way, causing her to fall to her left and hit her trapezius muscles between her shoulder and neck on the handrail. Dr. Kingsley reviewed appellant's medical records from the date of injury, noting that her left shoulder x-ray was negative. His examination revealed discomfort and tenderness to palpation in the trapezius muscles of the upper back just behind the left clavicle, pain in left trapezius muscles with reaching the left hand over head and with movement of the head. Dr. Kingsley diagnosed myalgia, referred appellant to physical therapy, and advised her to use ibuprofen. An accompanying duty status report (Form CA-17) of even date diagnosed shoulder pain and advised that appellant would need help when lifting objects above her head at work.

In November 1 and December 26, 2018 medical reports, Dr. Kingsley related appellant's history of injury, diagnosed myalgia, and advised that appellant should not lift, push, or pull more than 10 pounds with her left arm or lift above her head. In a work restriction note, patient discharge summary, and Form CA-17, all dated December 26, 2018, he related that appellant could lift, push, and pull up to 10 pounds with her left arm with no lifting above her head.

Appellant also submitted medical reports from Dr. Dominic McKinley, Board-certified in family practice and sports medicine, dated February 1 and 12, 2019. In his February 1, 2019 report, Dr. McKinley related appellant's history of injury. He indicated that, though appellant was in physical therapy, she continued to experience left shoulder and neck pain that was aggravated with activity. Dr. McKinley's examination revealed tenderness along the left side of appellant's neck, acromion region, and trapezius region, painful arc of motion with lightly limited flexion, positive empty can test, and positive impingement signs. He reviewed x-ray scans of the left shoulder taken that day, which revealed a partially fused os acromiale, and noted that there was some indication that the region had partially healed, as compared to the September 12, 2018 x-rays. Additionally, cervical spine x-rays revealed no abnormalities. Dr. McKinley diagnosed cervical strain with possible left-side radiculopathy and left shoulder pain, which he believed had multifactorial etiology, including possible referred pain from her neck, symptomatic healing os acromiale avulsion fracture, and possible rotator cuff injury. He recommended appellant undergo

magnetic resonance imaging (MRI) scans and advised that appellant should not lift more than 10 pounds with her left arm, lift overhead, or reach behind herself. In his February 12 report, Dr. McKinley noted that appellant's shoulder pain had increased, she was having difficulty lifting objects at work, and she had missed work in previous days due to the aggravated pain. He injected a mixture of betamethasone and lidocaine into the left subacromial space, which improved appellant's range of motion in her neck and left shoulder. Dr. McKinley advised that appellant should not work pending the recommended MRI scan.

In a development letter dated March 5, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her as to the type of factual and medical evidence needed and provided a questionnaire for completion. OWCP afforded appellant 30 days to respond.

Appellant submitted a Form CA-17 dated February 12, 2019 from Dr. McKinley, who diagnosed cervical radiculitis and left shoulder pain. Dr. McKinley recommended that appellant undergo an MRI scan of her left shoulder before returning to work.

On March 11, 2019 appellant responded to OWCP's development questionnaire, relating that she was delivering packages at an apartment complex on September 12, 2018 and, as she climbed the steps, a step collapsed and she "went left," trying to hold herself up while carrying packages, and hit her shoulder. She reported that she notified R.W., the employing establishment supervisor on September 12, 2018, the day she fell. Appellant also noted that she had no prior injuries.

In a March 19, 2019 medical report, Dr. McKinley noted appellant's continuing left shoulder and neck pain, as well as a sensation of "lack of blood flow" radiating from her shoulder down to her hand for the previous 4 to 6 weeks. Appellant had not returned to work and was no longer undergoing physical therapy. Dr. McKinley reviewed the March 9, 2019 left shoulder MRI and the March 16, 2019 cervical spine MRI.⁴ He diagnosed neck pain secondary to cervical strain due to compensating for left shoulder discomfort, noting that the MRI did not reveal findings consistent with a work-related injury, as well as persisting left shoulder pain with multifactorial etiology including symptomatic biceps tendinitis and aggravation of pre-existing left AC joint arthritis.⁵ Dr. McKinley advised that appellant should not lift more than five pounds or use her left upper extremity.

By decision dated April 11, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the incident occurred, as alleged. It noted that the evidence of record contained factual inconsistencies and that appellant had not adequately

⁴ The March 16, 2019 cervical spine MRI scan revealed suspected congenital incomplete segmentation of the C5-C6 cervical level, minor superimposed cervical spine degeneration, and borderline to mild left side neural foraminal stenosis at the left C7 and C8 nerve levels.

⁵ Dr. McKinley also diagnosed swelling and fullness in the left supraclavicular region associated with an enlarged axillary lymph gland unrelated to her injury.

described the mechanism of injury. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.⁶

On April 29, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on July 25, 2019. OWCP did not receive any further evidence.

By decision dated September 3, 2019, OWCP's hearing representative affirmed the April 11, 2019 decision, as modified, finding that the evidence of record established that the incident occurred as alleged. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted September 12, 2018 employment incident.⁷

OWCP subsequently received a September 13, 2019 narrative medical report from Dr. Dawn Quashie, a Board-certified family practitioner, who described appellant's employment duties and history of injury and examined appellant. Dr. Quashie diagnosed a sprain of the AC joint, a sprain of the left shoulder joint, and adhesive capsulitis of the left shoulder. She advised that appellant was temporarily disabled and should be on light-duty work. In her discussion of the September 12, 2018 employment incident, Dr. Quashie described the anatomy of the shoulder and stated that appellant "tried to stop her fall by stretching out her left arm . . . [and] she jammed her humerus into the shoulder joint leading to her shoulder sprain." She further explained what occurs when a person falls forward onto an outstretched hand,

"[T]he impact force travels up the arm and exits in the cervical spine (neck) and thoracic spine (upper back) similar to a whiplash type injury. Residual delayed symptoms may appear, which include headaches, neck pain, muscle spasm, tingling or numbness in the arm, and pain between the shoulder blades. [Appellant's] fall caused mechanical and functional damage to the left shoulder leading to inefficient movement and compensations. These neurological compensations are part of your nervous system['s] hardwired survival mechanism to avoid pain at all cost by taking the path of least resistance."

Dr. Quashie opined that appellant's shoulder sprain was directly and causally attributed to the September 12, 2018 employment incident.

On October 10, 2019 appellant requested reconsideration.

By decision dated January 7, 2020, OWCP denied modification of its September 3, 2019 decision.

OWCP subsequently received an October 7, 2020 narrative medical report from Dr. Quashie relating that appellant's neck and left shoulder pain had progressively worsened and

⁶ Appellant subsequently submitted the March 9, 2019 left shoulder MRI scan, which revealed mild supraspinatus and infraspinatus tendinosis, mild biceps tenosynovitis, mild AC osteoarthritis, and a single enlarged left axillary lymph node.

⁷ The hearing representative noted that appellant's 2016 injury had been assigned OWCP File No. xxxxxx987 and accepted for limited medical expenses without formal adjudication. The representative ordered the case files to be administratively combined. On January 9, 2020 it administratively combined OWCP File Nos. xxxxxx987 and xxxxxx854, with the current file designated as the master file.

that she continued to have reduced range of motion with pain for the left shoulder. She diagnosed arthropathy and primary osteoarthritis of the left shoulder and advised that appellant should remain on light duty. Dr. Quashie noted that “[w]hile most people experience wear and tear in their joints as they age, the development of [appellant’s] acromioclavicular joint arthrosis caused degeneration, disabling the shoulder joint, sometimes making it appear larger. Spurs, or spiny projections from the bones, may develop around the joint. With this condition, there is usually pain and swelling that limits the motion of the arm.” Dr. Quashie explained that appellant’s employment duties, including sorting mail and lifting and delivering packages, placed a great deal of stress on her shoulder joint, leading to “cartilage deterioration in her right [sic] shoulder ... and allowing arthritis to develop into the joint.” She opined that appellant’s September 12, 2018 fall through the apartment steps exacerbated her arthritic shoulder, leading to her AC joint arthropathy.

On January 29, 2021 appellant requested reconsideration. OWCP did not receive any further evidence.

By decision dated February 23, 2021, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁸ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁹ Timeliness is determined by the document receipt date, *i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.¹² OWCP’s procedures provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant’s request for reconsideration demonstrates “clear evidence of error” on the part of

⁸ 5 U.S.C. § 8128(a); *see T.J.*, Docket No. 21-0586 (issued September 30, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹¹ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

OWCP.¹³ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

The last merit decision was dated January 7, 2020. As appellant's request for reconsideration was not received by OWCP until January 21, 2021, more than one year after January 7, 2020, pursuant to 20 C.F.R. § 10.607(a), the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.¹⁹

The Board further finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing

¹³ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 10 at Chapter 2.1602.5 (September 2020).

¹⁴ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 10 at Chapter 2.1602.5a (September 2020).

¹⁶ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹⁷ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 10 at Chapter 2.1602.5(a) (September 2020).

¹⁸ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); see *Debra McDavid*, 57 ECAB 149 (2005).

regulations.²⁰ As noted, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²¹ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings and facts and a statement of reasons.²² As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²³

In the February 23, 2021 decision, OWCP did not address Dr. Quashie's October 7, 2020 medical report, which was received after the January 7, 2020 merit decision. It failed to analyze this evidence as to whether it was sufficient to demonstrate clear evidence of error. The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.

The case must, therefore, be remanded for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether appellant has demonstrated clear evidence of error.

²⁰ See *Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); see also 20 C.F.R. § 10.607(b).

²¹ 5 U.S.C. § 8124(a).

²² 20 C.F.R. § 10.126.

²³ Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 29, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board